

MANHATTAN LIFE INS. CO. v. McKOWN.

(Circuit Court of Appeals, Third Circuit. December 15, 1898.)

No. 44.

SET-OFF—ACTION ON LIFE INSURANCE POLICY—JUDGMENT AGAINST INSURED.

In an action by an executrix on a policy of insurance on the life of her testator, payable to his executors, administrators, or assigns, the defendant cannot set off a judgment in its favor against the decedent. In such case the plaintiff does not sue in her official capacity as for a debt due the decedent, who had no claim against the defendant, but as the payee named in the policy, and it is immaterial that the proceeds, when recovered, will go to the distributees of the estate.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action by Elizabeth C. McKown, executrix of James C. McKown, deceased, for the use of Elizabeth C. McKown, against the Manhattan Life Insurance Company. From a judgment for plaintiff, defendant brings error.

M. A. Woodward, for plaintiff in error.

Thomas Patterson, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance issued by the defendant to James C. McKown for \$10,000, payable to his executors, administrators or assigns, at the expiration of 90 days after proof of his death. The only defense is set-off. The defendant having obtained judgment against James C. McKown in his lifetime, for \$38,000, proposed to set it off against the plaintiff's demand. This the court refused to permit; and the defendant assigns the refusal as error. We think the court was right; and that the reasons given for its ruling, and the authorities cited, in dismissing a rule for new trial, sufficiently justify it. Set-off is only permissible where the debts involved, and the rights of the parties respecting them, are mutual. The defendant's claim must constitute a cause of action against the plaintiff, at the date of suit. Where the plaintiff sues on the rights of another, as assignee, or legal representative of a decedent, such mutuality exists if the debt proposed to be set off was owing by the assignor when the assignee's rights attached, or was contracted by the deceased, and due at the time stated. In the case before us the suit is by an executrix, and the debt offered was owing by the decedent and due in his lifetime. The plaintiff does not, however, sue in her official capacity, as for a debt due to the deceased, but as payee named in the policy. She is the creditor under the contract. McKown had no claim against the company; it owed him nothing. The situation is the same as if the policy had been in favor of his wife, his child, or a trustee for his creditors. It is not material that the money when recovered will go to the distributees of his estate; that is a consequence of the contract, which the parties chose to make.

The judgment is therefore affirmed.

PATTERSON v. THOMPSON et al.

(Circuit Court, D. Oregon. December 3, 1898.)

No. 2,459.

1. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—STATUTE OF OREGON.

The liability of directors of a bank, under Hill's Ann. Laws Or. § 3231, which makes such directors who vote for the declaration of a dividend when the bank is insolvent "jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office," is penal in its nature, and the directors are not, as to such liability, "joint contractors or united in interest," within the meaning of section 14 of such Laws, providing that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him or on a co-defendant, who is a joint contractor or united in interest with him; hence an action to enforce such liability is not commenced as to a particular defendant until the service of summons on him.

2. SAME—DEMURRER—FACTS APPEARING ON FACE OF COMPLAINT.

Under Hill's Ann. Laws Or. § 67, which authorizes a demurrer when it appears on the face of the complaint that the action has not been commenced within the time limited by the Code, it being further provided by section 14 that the action shall be deemed commenced when the complaint is filed and the summons served, the complaint and writ must be read together, and what appears from the two will be deemed, for the purposes of such demurrer, to appear on the face of the complaint.

On Demurrer to Complaint.

U. S. G. Marquam, for plaintiff.

Cyrus A. Dolph, for defendants.

GILBERT, Circuit Judge. Walter F. Burrell, one of the defendants, demurs to the complaint for the reason that it appears upon the face thereof that as to him the action was not commenced within the time limited by the Code of Civil Procedure of the State of Oregon. The action is brought to enforce the statutory liability which is imposed upon directors of banking corporations in cases where they have declared dividends of the funds of insolvent banks. Hill's Ann. Laws Or. § 3231. In the case of *Patterson v. Thompson*, 86 Fed. 85, recently decided in this court, it was held that the statutory liability is penal in its nature, and that the three-years statute of limitations applies. It is alleged in the complaint in the present case that on May 10, 1892, the plaintiff deposited \$978.33 with the Portland Savings Bank, of which bank the defendants were directors, and for which sum the bank gave him a certificate of deposit payable on May 1, 1895. The complaint was filed on March 26, 1898. On that day service of the complaint and summons was made upon one of the defendants, but summons was not issued against the defendant Burrell until June 16, 1898, and was not served upon him until June 22, 1898. The Annotated Laws of Oregon (section 67) provide that a defendant may demur to the complaint when it appears upon the face thereof "that the action has not been commenced within the time limited by this Code." Section 14 provides as follows: "An action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him." It is clear that the de-